

MODIFIED

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

MELYNDA SCHUSSLER

Appellant

v.

TREASURER OF THE STATE OF MISSOURI-CUSTODIAN OF
THE SECOND INJURY FUND

Respondent

DOCKET NUMBER WD74596

DATE: November 13, 2012

Appeal From:

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Appellate Judges:

Division Four

James Edward Welsh, C.J., Thomas H. Newton, J., and Charles E. Atwell, Sp. J.

Attorneys:

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Counsel for Appellant

Attorneys:

Kimberley Fournier, Kansas City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

MELYNDA SCHUSSLER, Appellant, v. TREASURER OF
THE STATE OF MISSOURI-CUSTODIAN OF THE
SECOND INJURY FUND, Respondent.

WD74596

Labor and Industrial Relations Commission

Before Division Four Judges: Welsh, C.J., Newton, J., and Atwell, Sp. J.

Schussler sought compensation from Employer and the Fund for carpal tunnel injury and disability she alleged occurred during her employment with Employer. Schussler suffered a number of disabling conditions prior to working for Employer, including multiple knee injuries, back injuries, and brittle type one diabetes. While she worked for Employer, a car accident caused further injury to Schussler's back. After returning to work, Schussler experienced carpal tunnel. The Commission denied a Fund award to Schussler because it determined she was permanently and totally disabled prior to the carpal tunnel because her conditions caused her to be unable to compete in the open labor market. Schussler appeals.

AFFIRMED.

Division Four Holds:

On appeal, Schussler contends the Commission's decision was not supported by sufficient competent evidence. We discuss her points out of order.

In her second point, Schussler argues that the Commission erred in denying her benefits because it ignored Dr. Koprivica's testimony that she was permanently and totally disabled as a result of her combined injuries, including the work injury. The Commission may not reject uncontradicted medical testimony on the issue of medical causation. However, employability is not an issue of medical causation and is held to be a matter within the Commission's expertise.

The Commission's finding that Schussler was permanently and totally disabled prior to working for Employer was not against the overwhelming weight of the evidence. The test for permanent total disability is whether the worker is able to compete in the open labor market. The Commission relied on Titterington's opinion, as well as the facts adduced in hearing, which demonstrated that the positions Schussler held were generally either short-term or heavily accommodated. Additionally, Dr. Koprivica's opinion was not in direct contradiction with Titterington's opinion. Finally, Schussler's employment with Employer does not bar a finding that she was unable to compete in the open labor market. A claimant may be found permanently and totally disabled even if holding limited, sporadic, and/or highly accommodated employment. Schussler's second point is denied.

In her first point, Schussler argues the Commission erred because it did not make findings under section 287.220.1. Section 287.220 provides the methodology for calculating disability where there was a previous partial disability and permanent disability results. The Commission is not required to follow this methodology where the claimant was already permanently and totally disabled, as is the case here. Schussler's first point is denied.

Therefore, we affirm the Commission's award.

Opinion by Thomas H. Newton, Judge

November 13, 2012

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